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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Mark L. Boyer et al.
Serial No.: 09/239,878
Filing Date: January 29, 1999
Title: PRE-CAST SECURITY VAULT

Art Unit: 3635
Examiner: Beth A. Stephan

Commissioner for Patents
U.S. Patent and Trademark Office
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Arlington, VA 22202

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APPELLANT'S BRIEF UNDER 37 C.F.R. § 1.192

Appellant takes this appeal from the October 9, 2001, final Office Action in the above-identified application. On April 5, 2002, Appellant filed a Notice of Appeal. Appellant hereby files this Appellant's Brief in triplicate in connection with the Notice of Appeal.

1. Real Parties-in-Interest

The real parties in interest are Mark L. Boyer and Michael E. Barker who are the named inventors in this application.

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2. Related Appeals and Interferences

GROUP 3600

There are no other appeals or interferences known to Appellant or Appellant's attorneys that will directly affect, or be directly affected by, or have a bearing on, the Board's decision in the pending Appeal.

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3. Status of Claims

Claims 33-35 are pending in this application and are the claims from which this Appeal is taken. These claims were finally rejected in an Office Action dated October 9, 2001. Claims 1-16 were canceled prior to examination on the merits. Claims 17-22 were canceled in a Reply filed on November 4, 1999. Claims 23-26 were canceled in a Reply filed on May 25, 2000. Claims 27-29 were canceled in a Preliminary Amendment filed on April 23, 2001, with the Continuing Prosecution Application (CPA) that resulted in this application. Claims 30-32 were withdrawn by the Examiner in an Office Action dated June 14, 2000, as being directed to a non-elected invention.

A copy of the currently pending claims is attached herewith in Appendix A.

4. Status of Amendments

All previous amendments have been entered. Appellant proposes the following new amendments to correct antecedent basis and dependency errors in the claims. A marked-up version showing proposed changes to the claims is attached herewith in Appendix B.

34. (Amended) A modular vault of claim 33, wherein a plurality of hooks are integrally formed into the seamless housing body for facilitating hoisting the seamless housing body.

35. (Amended) A modular vault of claim 33, wherein there are more than two side walls.

5. Summary of Invention

Appellant's claims are directed to a modular vault. Appellant notes that the United States Patent and Trademark Office has issued other patents related to vaults, including U.S. Patent No. 6,003,271 (Boyer et al.) entitled "Pre-cast Security Vault."

The modular vault claimed by Appellant comprises a seamless housing body that is unitarily formed as a single piece. The seamless housing body has portions that define a front wall, a rear wall, two side walls, a roof, and a floor. The front wall has a door opening. A doorframe of the modular vault is positionable in the door opening, and a door of the modular vault is mountable in the doorframe. The door is preferably fire resistant and burglary proof. See, e.g., page 7, lines 5-17; Figure 4.

An advantage of the claimed invention is the housing body is unitarily formed as a single piece. As such, the modular vault can be entirely prefabricated at a remote facility, then transported to a desired location for installation. To install, the modular vault can be conveniently dropped into place without any additional assembly. Thus, the expenses and difficulties associated with constructing a vault in-place are avoided. Another advantage is that the housing body is seamless. The seamless housing body renders the modular vault vapor-tight and, therefore, better able to protect the contents of the vault from external environmental influences. See, e.g., page 7, lines 11-31; Figures 5-6.

Appellant's main claim is reproduced below with reference numerals inserted for easy reference to the Specification:

33. A modular vault comprising:
a seamless housing body (100) unitarily formed as a single piece,
said seamless housing body (100) having portions defining a front wall

(20) having a door opening therethrough, a rear wall (104), two side walls (106, 108), a roof (110) and a floor (112);
a door frame (116) positionable in the door opening; and
a door (118) mountable in the door frame (116) whereby said vault is fire resistant and burglary proof.

Claim 34 further defines the modular vault in that hooks (124) may be integrally formed in the housing body (100) to facilitate hoisting thereof. Claim 35 further defines the modular vault in that more than two side walls (106, 108) may be added to the modular vault.

6. Issues

- I. WHETHER U.S. PATENT NOS. 4,485,598 (GUARDIANI) AND 5,210,985 (HSU) ARE ANALOGOUS ART UNDER 35 U.S.C. § 103
 - A. *The Guardiani reference*
 - B. *The Hsu reference*
 - C. *Guardiani and Hsu are not in the same field of endeavor as the claimed invention*
 - D. *Guardiani and Hsu are not reasonably pertinent to the claimed invention*
- II. WHETHER THE CLAIMED INVENTION IS PATENTABLE UNDER 35 U.S.C. § 103 OVER GUARDIANI IN VIEW OF HSU
 - A. *The preamble limits the claimed invention to a vault*
 - B. *The rooms of Guardiani and Hsu cannot be used to reject the claimed invention because they are not vaults*
 - C. *There is no motivation to combine Guardiani and Hsu*
 - D. *The Examiner has engaged in impermissible hindsight reconstruction*
 - E. *The combination of Guardiani and Hsu does not produce the claimed invention*

7. Grouping of the Claims

Claim 33 is the only independent claim presently pending in the application. Claims 34 and 35 each recite independently allowable subject matter in addition to being dependent on Claim 33. Accordingly, Claims 33-35 do not stand or fall together for purposes of this Appeal.

8. Arguments in Support of the Claims

I. U.S. PATENT NO. 4,485,598 (GUARDIANI) AND U.S. PATENT NO. 5,210,985 (HSU) ARE NOT ANALOGOUS ART UNDER 35 U.S.C. § 103

A. The Guardiani reference

The *Guardiani* reference is directed to prefabricated elements of a house or other similar structures. The prefabricated elements include plinths, rooms or fractions of rooms, staircases, roofs, pillars and self-supporting panels. Such prefabricated elements can be quickly assembled in a modular manner to build single or two story structures. The stability of the structure is derived from the weight of the elements and/or by using reinforced materials such as reinforced concrete. See, e.g., col. 1, lines 8-50; Abstract.

B. The Hsu reference

The *Hsu* reference is directed to a “fire-escaping” room for a high rise building. The fire-escaping room can provide basic living necessities (e.g., toilet, bath) for a person in case of a fire, while effectively isolating the room from flames and heavy smoke. The *Hsu* fire-escaping room is made of concrete and includes a fire-proof door, vent holes on the fire-proof door, a slide

block set that is operable to close or open the vent holes, a manually operated air pump, and a sprinkler pipe disposed around the room. See, e.g., col. 1, lines 5-52; Abstract.

C. Guardiani and Hsu are not in the same field of endeavor as the claimed invention

In the Final Office Action dated October 9, 2001, the Examiner rejected all Claims 33-35 under 35 U.S.C. § 103 as being unpatentable over *Guardiani* in view of *Hsu*. Appellant respectfully submits that *Guardiani* and *Hsu* not in the same field of endeavor as the claimed invention to merit treatment as analogous art for purposes of 35 U.S.C. § 103.

Whether a reference may be treated as analogous art is determined by a two-step process. First, it must be determined whether the reference is “within the field of the inventor’s endeavor.” Second, if the reference is outside that field, it must be determined whether the reference is “reasonably pertinent to the particular problem with which the inventor was involved.” In re Deminski, 796 F.2d 436, 230 USPQ 313 (Fed. Cir. 1986).

A reference is reasonably pertinent if it is one which, because of the matter with which it deals, logically would have commended itself to an inventor’s attention in considering his problem. Thus, the purposes of both the invention and the prior art are important in determining whether the reference is reasonably pertinent to the problem the invention attempts to solve. If a reference has the same purpose as the claimed invention, then the reference relates to the same problem, and that fact would support the use of the reference in an obviousness rejection. In re Clay, 966 F.2d 656, 23 USPQ2d 1058 (Fed. Cir. 1992).

The two-step process was applied in Wang Laboratories, Inc. v. Toshiba Corp., 993 F.2d 858, 26 USPQ2d 1767 (Fed. Cir. 1993), to find the prior art was non-analogous. In Wang

Laboratories, the patents concerned single in-line memory modules (“SIMMs”) having nine memory chips packaged in plastic leaded chip carriers (“PLCCs”). The prior art disclosed a SIMM with nine memory chips mounted in a single row. The accused infringers argued that the patents were invalid as obvious in view of the prior art. The jury found that the patent was valid.

The Court of Appeals for the Federal Circuit held that substantial evidence supported the jury’s determination that the putative prior art was neither in the same field of endeavor nor reasonably pertinent thereto. As to field of endeavor, although both modules were used as computer memories, the court found:

The Allen-Bradley art is not in the same field of endeavor as the claimed subject matter merely because it relates to memories. It involves memory circuits in which modules of varying sizes may be added or replaced; in contrast, the subject patents teach compact modular memories. 993 F.2d at 864, 26 USPQ2d at 1773.

As for reasonable pertinence, the court found that the purpose of the patented invention was to provide a compact module, whereas size was not a consideration in the prior art module.

In the present case, neither *Guardiani* nor *Hsu* is within the same field of endeavor as the claimed invention. The field of endeavor of the claimed invention is walk-in vaults. See, e.g., page 1, lines 5-8. Note that the term “vault” is recited in the body of Claim 33 as well as in the preamble and throughout the Specification. In contrast, nowhere does the term “vault” appear in either *Guardiani* or *Hsu*. Instead, the *Guardiani* field of endeavor is modular buildings (see, e.g., col. 1, lines 8-10), and the *Hsu* field of endeavor is fire proof rooms (see, e.g., col. 1, lines 5-11).

Alternatively, all three fields of endeavor may be defined in more generic terms, for example, “walled structures” or “enclosed structures.” Even under such a generic definition, *Guardiani* and *Hsu* would still not be in the same field of endeavor as the claimed invention. In

Wang Laboratories, the field of endeavor of the claimed invention and the prior art was found to be computer memories. Nevertheless, the court in Wang Laboratories held that the prior art was not in the same field of endeavor merely because it relates to computer memories. Likewise, *Guardiani* and *Hsu* are not in the same field of endeavor as the claimed invention merely because they may be related to enclosed structures. The enclosed structure of the claimed invention provides security from intrusion. Security from intrusion is nowhere found to be a consideration for the enclosed structure of *Guardiani*. Instead, the focus of *Guardiani* is stability, flexibility, and aesthetics. Similarly, the focus of *Hsu* is protection from flames and smoke, which is altogether different from protection from intrusion.

D. Guardiani and Hsu are not reasonably pertinent to the claimed invention

The second step in the two-step process outlined by In re Deminski is to determine whether the prior art is reasonably pertinent to the claimed invention. To be reasonably pertinent, the prior art and the claimed invention must share the same purpose. The purpose of the claimed invention is to provide a walk-in vault that can be easily and quickly installed inside a building. The inventors recognized that, while walk-in vaults were very desirable for their high level of security, existing walk-in vaults had to be built in-place. Being built in-place made walk-in vaults too expensive for the average person and prolonged building construction time. Being built in-place also made it more difficult to add a walk-in vault to an existing building. To solve this problem, the inventors created a walk-in vault that is entirely prefabricated. Such a prefabricated walk-in vault could then be quickly and easily installed inside a building. See, e.g., page 1, lines 5-22; page 7, lines 11-31; Figures 5-6.

The purpose of *Guardiani*, on the other hand, is to be able to construct the building itself using prefabricated elements, and to be able to do so quickly, while at the same time providing greater height, functionality, and aesthetic diversification for the building. *Guardiani* recognized that the existing prefabricated elements were designed for constructing temporary emergency buildings, usually following natural catastrophes and the like. These structures lacked functionality and aesthetic appeal, and were usually limited to a single story. To solve this problem, *Guardiani* created prefabricated elements that have particular shapes and means for quick assembly into buildings with more than one floor that are also functional and aesthetically diverse. See, e.g., col. 1, lines 8-50; Abstract.

Hsu also has a different purpose than the claimed invention, namely, to provide a temporary shelter in case of a fire. *Hsu* recognized that in cities with dense populations, there are usually a large number of tall buildings in order to meet the demands for residential and office space. However, escape from these tall buildings is very difficult in case of a fire. The aim of *Hsu*, therefore, is to provide a “fire-escaping” room that can be used as a shelter for waiting out a fire in tall buildings. See, e.g., col. 1, lines 5-52; Abstract.

Accordingly, because *Guardiani* and *Hsu* are neither in the same field of endeavor as, nor reasonably pertinent to, the claimed invention, the references cannot be analogous prior art for purposes of 35 U.S.C. § 103.

II. THE CLAIMED INVENTION IS PATENTABLE UNDER 35 U.S.C. § 103 OVER GUARDIANI IN VIEW OF HSU

A. *The preamble limits the claimed invention to a vault*

The preamble of Claim 33 states that the claim is directed to a modular vault. In the Final Office Action dated October 9, 2001, the Examiner rejected all the claims under 35 U.S.C. § 103 as being unpatentable over *Guardiani* in view of *Hsu*. In making the rejections, the Examiner ignores the fact that neither *Guardiani* nor *Hsu* is directed to a vault.

A preamble is a limitation on a claim when the preamble is necessary to give life, meaning, and vitality to the claim. Kropa v. Robie, 187 F.2d 150, 152, 88 USPQ 478, 480 (CCPA 1951); Gerber Garment Technology Inc. v. Lectra Systems Inc., 916 F.2d 683, 688, 16 USPQ2d 1436, 1441 (Fed. Cir. 1990). In Kropa, the Court of Customs and Patent Appeals found that a preamble reciting “An abrasive article” was essential in pointing out an invention defined by claims directed to an article comprising abrasive grains and a hardened binder. In that case, the appellant sought to claim priority to his earlier application, which disclosed abrasive grains and a hardened binder, but not in the form of an abrasive article. In denying appellant priority, the court reasoned that not every union of substances capable of use as abrasive grains and a binder is an “abrasive article,” and it is only by the preamble that it can be known the subject matter defined by the claims is comprised as an abrasive article. Kropa at 152.

In Gerber Garment, the Federal Circuit found that terms in the preamble that are also referenced in the body of the claim are an integral part of the claim. Gerber Garment at 689 In that case, the claim was directed to an apparatus for holding an object in a rigid condition while it is being worked on. The phrase “cutting blade” appeared in the preamble and was also repeatedly referenced in the body of the claim. For this reason, the Federal Circuit held that the

cutting blade was not merely an aspect of the claim environment, but was an affirmative limitation of the claim. *Id.*

In the present case, as in Kropa, the preamble is essential in pointing out the invention defined by the claims. There are numerous structures that have a housing body with four walls, a roof, and a floor, and it is only by the phrase “A modular vault” in the preamble that it can be known the subject matter defined by the claims is comprised as a vault. Therefore, the phrase “modular vault” is necessary to give life, meaning, and vitality to the claims. Moreover, as in Gerber Garment, the term “vault” is also referenced in the body of the claim. Thus, “vault” is an integral part of the claim and an affirmative limitation of the claim. Since neither *Guardiani* nor *Hsu* is directed to a vault, these references cannot be used to render the claims obvious under 35 U.S.C. § 103.

B. The rooms of *Guardiani* and *Hsu* cannot be used to reject the claimed invention because they are not vaults

In rejecting the claims, the Examiner states that *Guardiani* and *Hsu* disclose a modular vault. See Final Office Action dated October 9, 2001, page 2. Appellant respectfully submits that the rooms of *Guardiani* and *Hsu* are not vaults and would never be used as vaults.

A “vault” is room that is especially designed for safekeeping of valuables. See, e.g., Merriam-Webster’s Collegiate Dictionary. As such, the vault is inherently highly secured from intrusion by burglars and other intruders. The rooms of *Guardiani*, on the other hand, have openings for windows. See, e.g., col. 6, lines 4-10; Figure 4. The window openings no doubt provide some of the aesthetic diversity. However, such window openings can serve as entry

points through which a professional burglar may enter. In fact, this is the reason most people specifically install vaults rather than store their valuables in their rooms.

Security from intrusion is also not a consideration of the fire-escaping room of *Hsu*. To the contrary, most people would make their fire-escaping room as accessible as possible so that they can easily and immediately enter the room during a fire. The last thing they would want is to fumble around with keys or other security mechanisms during the confusion and chaos of a fire, which is what they would have to do if they used the fire-escaping room as a vault.

More to the point, since neither *Guardiani* nor *Hsu* are even directed to vaults, no one of ordinary skill in the vault art would consider looking to these references for vault related information, much less derive the modular vault of the claimed invention from them. Accordingly, *Guardiani* and *Hsu* cannot be used to render the claims obvious under 35 U.S.C. § 103.

C. *There is no motivation to combine Guardiani and Hsu*

In making the rejection against the claims, the Examiner states that *Guardiani* discloses all the limitations of the claimed modular vault, except that *Guardiani* lacks the specific use of a doorframe with the door. The Examiner contends, however, that *Hsu* teaches a modular vault having a doorframe, and that it would have been obvious to provide the vault of *Guardiani* with the doorframe of *Hsu* for purposes of securing the door to the wall. Aside from the fact that neither *Guardiani* nor *Hsu* discloses a vault, Appellant respectfully submits there is no motivation to combine *Guardiani* and *Hsu*.

“When patentability turns on the question of obviousness, the search for and analysis of the prior art includes evidence relevant to the finding of whether there is a teaching, motivation,

or suggestion to select and combine the references relied on as evidence of obviousness.” In re Sang Su Lee, 277 F.3d 1338, 1343, 61 USPQ2d 1430, 1443 (Fed. Cir. 2002). “There are three possible sources for a motivation to combine references: the nature of the problem to be solved, the teachings of the prior art, and the knowledge of persons of ordinary skill in the art.” In re Rouffet, 149 F.3d 1350, 1357, 47 USPQ2d 1453, 1457-58 (Fed. Cir. 1998). The mere fact that a device in a cited reference could have been modified to yield a device within the claimed invention does not make the modification obvious unless the prior art suggested the desirability of the modification. In re Gordon, 221 USPQ 1125, 1127 (Fed. Cir. 1984). The Examiner can satisfy the burden of showing obviousness of the modification “only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references.” In re Fritch, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992).

In the present case, the Examiner indicates the motivation to combine *Guardiani* and *Hsu* is to be able to secure the door to the wall. However, the door can be secured equally well by hinging it directly to the wall without a doorframe. In fact, such an arrangement would eliminate the additional expenses and time required to purchase and install a doorframe. More to the point, there is simply no hint or suggestion in *Guardiani*, or in the knowledge of persons of ordinary skill in the art, that a door must have a doorframe. In other words, there is no indication in *Guardiani* that a lack of a doorframe is a problem that needs to be overcome.

Even assuming *arguendo* that a person of ordinary skill in the art reading *Guardiani* would wish to add a doorframe for the door, he would not look to *Hsu* for the doorframe. *Guardiani* is directed to prefabricated elements of a house or other similar structures, whereas *Hsu* is directed to a fire-escaping room. The two references are not in the same field of

endeavor, nor are they reasonably related to one another. A person of ordinary skill in the prefabricated housing elements art, even assuming he is aware of the *Hsu* reference, would never look to such a reference for information related to prefabricated elements. Accordingly, Appellant respectfully submits that there is no motivation to combine these two references.

D. The Examiner has engaged in impermissible hindsight reconstruction

The only reason the Examiner was able to arrive at the *Guardiani* and *Hsu* combination is by using impermissible hindsight. “It is impermissible to use the claimed invention as an instruction manual or ‘template’ to piece together the teachings of the prior art so that the claimed invention is rendered obvious.” In re Fritch, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992). The Examiner “cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention.” In re Fine, 5 USPQ2d 1596, 1600 (Fed. Cir. 1988). Moreover, “that which is within the capabilities of one skilled in the art is not synonymous with obviousness.” Ex Parte Levengood, 28 USPQ2d 1300, 1301 (Bd. App. 1993).

In the present case, Appellant respectfully submits the Examiner used impermissible hindsight to modify the modular rooms in *Guardiani* to achieve the claimed invention. Appellant further submits that if the Examiner had read *Guardiani* without prior knowledge of the claimed invention, the Examiner would not have been motivated to make the modification now urged. There is simply no hint or suggestion in *Guardiani* to add a doorframe. Instead, the Examiner reviewed the claimed invention and compared it with the *Guardiani* disclosure. As mentioned above, there is no problem or disadvantage in *Guardiani* that would be overcome by adding a doorframe. The Examiner simply recognized the absence of doorframe in *Guardiani*,

and found a second reference, *Hsu*, that disclosed the doorframe. The Examiner then decided it would be beneficial to modify *Guardiani* with the *Hsu* to obtain the claimed invention.

Appellant respectfully submits that the Examiner has reconstructed the claimed invention from *Guardiani* and *Hsu* by using Appellant's specification as a template. The Examiner has not identified any prior art which suggests or teaches the same steps that the Examiner has undertaken to obtain the claimed invention. Instead, the Examiner carefully identified the missing element from the *Guardiani* reference, picked a second reference that contains the missing element, and added the missing element to *Guardiani*. Such hindsight reconstruction is impermissible for purposes of an obviousness rejection under 35 U.S.C. § 103.

E. The combination of Guardiiani and Hsu does not produce the claimed invention

Assuming *arguendo* that there is motivation to combine the two references, Appellant respectfully submits that the combination would fail to produce the claimed invention. The modular vault of the claimed invention includes a seamless housing body that is unitarily formed as a single piece. Nowhere does *Guardiani* disclose or suggest a housing body that is seamless and unitarily formed as a single piece. The Examiner urges that Figure 6 of *Guardiani* shows a seamless room unitarily formed as a single piece. However, Figure 6 shows only a portion of a room. While the portion shown does appear to be seamless, it does not necessarily follow that the entire room is seamless, or that it is unitarily formed as a single piece. Appellant's position can be supported by the lack of any mention in *Guardiani* regarding a "seamless" room, unitarily formed as a single piece. Indeed, the objective of *Guardiani* is not to provide a seamless room, but rather to provide functional and aesthetically diverse buildings. This objective can be easily achieved using rooms that are neither seamless nor unitarily formed as a single piece.

Likewise, *Hsu* also does not disclose or suggest a seamless housing body unitarily formed as a single piece. *Hsu* discloses a fire-escaping room comprising four walls, a floor and a roof, but fails to teach that such walls, floor and roof are seamless or formed as a single piece. In fact, *Hsu* cannot be considered to teach a seamless housing body unitarily formed as a single piece because the fire-escaping room of *Hsu* has seams. See, e.g., Figure 1 (the seam between the walls 16 and 17). Therefore, Appellant respectfully submits the combination of *Guardiani* and *Hsu* would fail to produce the claimed invention.

9. Conclusion

For all of the foregoing reasons, Appellant requests that the Board of Patent Appeals and Interferences reverse the decision of the Examiner in whole and explicitly state that Claims 33-35 are allowable.

The Commissioner is hereby authorized to charge any fee which may be required, or credit any overpayment, to Deposit Account No. 10-0447, Reference No. 41241-6USD1 (DGN).

Respectfully submitted,

Date: 7/3/02



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Appendix A

Claims Involved in the Appeal

33. A modular vault comprising:
- a seamless housing body unitarily formed as a single piece, said seamless housing body having portions defining a front wall having a door opening therethrough, a rear wall, two side walls, a roof and a floor;
- a door frame positionable in the door opening; and
- a door mountable in the door frame whereby said vault is fire resistant and burglary proof.
34. A modular vault of claim 30 wherein a plurality of hooks are integrally formed into the cast housing body for facilitating hoisting the cast housing body.
35. A modular vault of claim 30 wherein there are more than two side walls.

Appendix B

Proposed Amendments

34. (Amended) A modular vault of claim [30] 33, wherein a plurality of hooks are integrally formed into the [cast] seamless housing body for facilitating hoisting the [cast] seamless housing body.

35. (Amended) A modular vault of claim [30] 33, wherein there are more than two side walls.